

Board of Curators of the University of Missouri v. Horowitz: **Academic Versus Judicial Expertise**

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In *Board of Curators of the University of Missouri v. Horowitz*¹ the United States Supreme Court rejected the argument that public university students are constitutionally entitled to a hearing prior to their dismissal from school for academic reasons. In ruling against a former medical student at the University of Missouri-Kansas City,² the Court concluded that "the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."³ In this article that conclusion and the several opinions in *Horowitz* will be analyzed and criticized; questions left unanswered by the *Horowitz* decision and the possibility of nonconstitutional student protection will also be explored.⁴

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1. 435 U.S. 78 (1978).

2. In her final year of study Charlotte Horowitz was dismissed from the University of Missouri-Kansas City Medical School for allegedly failing to satisfy the school's academic requirements. During her first year of study, several faculty members had "expressed dissatisfaction with her clinical performance during a pediatrics rotation. The faculty members noted that [her] 'performance was below that of her peers in all clinical patient-oriented settings,' that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene." 435 U.S. at 81. Ms. Horowitz' dismissal followed when her second-year performance was not deemed to have shown the "radical improvement" required by the Medical School's Council on Evaluation. *Id.*

Ms. Horowitz then filed a lawsuit under 42 U.S.C. § 1983 (1970) claiming that the dismissal violated her fourteenth amendment rights to procedural and substantive due process. After a bench trial the district court entered judgment for the defendants. *Horowitz v. Curators of the University of Missouri*, No. 74CV47-W-3 (W.D. Mo. Nov. 14, 1975).

3. 435 U.S. at 90. The majority therefore determined that "considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment." 435 U.S. at 86 n.3.

The right to some form of notice prior to dismissal is not specifically addressed by the *Horowitz* majority, but at least one court has concluded that students are entitled to notice prior to an academic dismissal despite the inapplicability of any procedural hearing requirements. *Gaspar v. Bruton*, 513 F.2d 843, 851 (10th Cir. 1975) ("All that is required is that the student be made aware prior to termination of his failure or impending failure to meet those [minimum academic] standards."). See also *Drown v. Portsmouth School Dist.*, 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971) (teacher entitled to written explanation of dismissal, but not to hearing). It is likely that most students will receive such notice in any event, and the practical utility of the notice is now limited to possible use as a basis for a later court challenge to the dismissal as "arbitrary, capricious or in bad faith." See text accompanying notes 36-45 *infra*.

4. For pre-*Horowitz* commentaries on constitutional due process rights in academic dismissals from institutions of higher education, see Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J. L. & EDUC. 277 (1976); Note, *Due Process and the University Student: The Academic/Disciplinary Dichotomy*, 37 LA. L. REV. 939 (1977) [hereinafter cited as Note, *Due Process and the University Student*]; Note, *Due Process in Academic Dismissals from Post*

I. THE NEW FEDERAL CONSTITUTIONAL STANDARD: A DECISION COMPRISED OF DICTA

Prior to any discussion of the individual issues or opinions in *Horowitz*, it is important to recognize the common thread running through both the majority and minority opinions in the case: regardless of the individual Justices' conclusions on the general question of student due process rights in academic dismissals, all members of the Court agreed that Charlotte Horowitz had received a full and fair predissmissal hearing. As Justice Rehnquist wrote for the majority, "Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires."⁵

Despite the fact that all of the Justices agreed that Charlotte Horowitz had received full procedural due process from the defendant university,⁶ seven members of the Court chose to express an opinion on whether the Constitution generally requires a public university to afford students any type of hearing prior to their expulsion or separation from the university for academic reasons.⁷ The majority's dictum that the fourteenth amendment does not require such a hearing⁸ therefore constitutes a breach of the

Secondary Schools, 26 CATH. U. L. REV. 111 (1976) [hereinafter cited as Note, *Due Process in Academic Dismissals*].

5. 435 U.S. at 84-85.

6. The Supreme Court determined that, "The ultimate decision to dismiss respondent was careful and deliberate." 435 U.S. at 85. A majority of the doctors who evaluated Horowitz' clinical competence, however, did not vote for her dismissal as opposed to voting that she not be graduated in the spring of 1973 (with the possibility of continued study and eventual graduation left open). Of the seven doctors who evaluated her clinical proficiency, only two recommended that she be immediately dropped from the medical school, while two others recommended that she be graduated on schedule in June 1973. The three remaining physicians recommended that Horowitz not be graduated on schedule but be continued on academic probation. 435 U.S. at 81.

On May 7, 1973, Charlotte Horowitz was notified by the dean of her medical school that she would not be allowed to graduate on schedule in June 1973. Therefore, despite the fact that she had received credit for all courses completed prior to the decision that she would not graduate, she was notified of her dismissal. This decision was reached without any prior notice to Horowitz or opportunity for her to state her case. 435 U.S. at 82.

Judge Ross, writing for the Eighth Circuit panel which unanimously concluded that Charlotte Horowitz had been denied due process, described what he perceived to be a critical defect in the dismissal:

The parties agree that the appeal procedure, involving tests administered by the panel of seven doctors, related only to the decision not to graduate Horowitz, and not to the decision to expel her. Nevertheless, we doubt that this procedure would satisfy the requirement of due process, since the panel itself was only an examining board without any power except the power to make recommendations to another body [the university's Council on Evaluation] which also had only that same power.

Horowitz v. Board of Curators of the Univ. of Mo., 538 F.2d 1317, 1321 n.4 (8th Cir. 1976), *rev'd*, 435 U.S. 78 (1978).

7. Justice Blackmun, in an opinion joined by Justice Brennan, found it "unnecessary . . . to indulge in the arguments and counterarguments contained in the two opinions as to the extent or type of procedural protection that the Fourteenth Amendment requires in the graduate school-dismissal situation" since all members of the Court agreed that Charlotte Horowitz had "received all the procedural process that was due her under the Fourteenth Amendment." 435 U.S. at 109.

8. "We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment." 435 U.S. at 86 n.3.

rule of judicial self-restraint that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' "

The statement that procedural due process is inapplicable to academic dismissals is not the only major dictum contained in Justice Rehnquist's majority opinion. Near the end of that opinion Justice Rehnquist asserted in dictum that "judicial intrusion into academic decisionmaking" should be curtailed even when a student alleges that his or her dismissal was violative of substantive due process.¹⁰ The Justice then added a final major dictum that a state university's failure to follow its own rules is not a constitutional violation.¹¹ These three major dicta will now be considered.

A. *The Evaluative Nature of the Dismissal Decision and the Issue of Academic Expertise*

The *ratio decidendi* of the majority opinion in *Horowitz* is not the absence of a constitutionally protected liberty or property interest in academic dismissal situations.¹² The decision turns, rather, on "the evaluative nature of the [predismissal] inquiry and the historically supported interest of the school in preserving its present framework for academic evaluations."¹³ These two factors—the evaluative nature of the dismissal decision and the advisability of keeping this decision-making process within the academic institution—thus weighed so heavily in the majority's balancing of competing interests¹⁴ that, even assuming the

9. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Justice Rehnquist's dictum regarding the procedural due process rights of students also conflicts with two other principles of constitutional adjudication enunciated by Justice Brandeis in his *Ashwander* opinion. These are, namely, that the Court "will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' " and that the Court "will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Id.* at 347. Although Justice Rehnquist has himself recognized the inappropriateness of "sweeping pronouncement[s]" unnecessary to the disposition of the specific case before the Court, *Aldinger v. Howard*, 427 U.S. 1, 18 (1976), he has been criticized for failing to consistently adhere to this principle. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 341-49 (1976).

10. 435 U.S. at 92.

11. *Id.* at 92 n.8.

12. The majority opinion "[a]ssum[ed] the existence of a liberty or property interest." *Id.* at 84-85. The Court therefore implicitly recognized that the evaluative nature of the dismissal decision and the expertise of school authorities in making such decisions are factors affecting the *form* of any due process hearing rather than the existence of a constitutional due process interest in the first instance. As the Eighth Circuit Court of Appeals concluded in a case concerning an academic dismissal from a medical school's psychiatric residency program, "[s]chool officials have a strong interest in freedom from outside intervention in matters of academic evaluation in order to maintain the integrity of the academic process. This interest does not, however, defeat the threshold determination as the applicability of the Due Process Clause." *Navato v. Sletten*, 560 F.2d 340, 345 (8th Cir. 1977).

13. 435 U.S. at 86 n.3.

14. *Id.* See also *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976):

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function

existence of otherwise constitutionally protected interests, the Court refused to require any due process protections prior to academic dismissal.¹⁵

The first basis for the majority's refusal to afford procedural protections to students threatened with academic dismissal—"the evaluative nature of the [predismissal] inquiry"—is undeniably a strong argument for not requiring the full panoply of procedural safeguards applicable to other governmental decision-making in the school dismissal decision. The inappropriateness of such plenary protections¹⁶ does not mean, however, that other, more appropriate protections cannot be molded by the courts¹⁷ (or, preferably, by the public universities themselves¹⁸) or that Charlotte Horowitz was not at a minimum "entitled to be informed of the reasons for her dismissal and to an opportunity personally to state her side of the story."¹⁹

Justice Rehnquist's majority opinion also assumes that all dismissals which a college or university labels "academic" involve solely subjective and evaluative decisions. However, as Justice Marshall pointed out in his dissent,

[w]hether [Charlotte Horowitz'] inadequacies can be termed "pure academic reasons" . . . is ultimately an irrelevant question, and one placing an undue emphasis on words rather than functional considerations. The relevant point is that respondent was dismissed largely because of her conduct, just as

involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

15. Cf. *Ingraham v. Wright*, 430 U.S. 651, 682-83 n.55 (1977), in which Justice Powell concluded that the absence of "manageable standards for determining what process is due in a particular case . . . illustrates the hazards of ignoring the traditional solution of the common law" and of recognizing a constitutional right to a hearing. Thus the Supreme Court, in a ruling not dissimilar from the majority opinion in *Horowitz*, found that the unique position of public secondary schools made due process hearings prior to the imposition of corporal punishment inappropriate, despite the finding that a fourteenth amendment liberty interest was implicated by such punishment.

16. Compare *Morrissey v. Brewer*, 408 U.S. 471, 484-90 (1972) (comprehensive procedures mandated for parole revocation) and *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (comprehensive procedures mandated for termination of welfare benefits) with *Goss v. Lopez*, 419 U.S. 565, 577-84 (1975) ("rudimentary precautions" required prior to school disciplinary dismissals).

17. See, e.g., Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841 (1976). Roger Cramton has suggested that alternative modes of administrative decision-making be evaluated on the basis of their accuracy, efficiency, and acceptability rather than upon the traditional notions of due process against which trial-type hearings are usually measured. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585 (1972). Due process itself, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring), but instead requires notice and hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

18. "[T]he courts must be given guidance by the academic community; they can hardly be expected to be experts on the needs and circumstances of that community and its judicial processes." Fisk, *A System of Law for the Campus: Some Reflections*, 38 GEO. WASH. L. REV. 1006, 1020 (1970). However, once dismissal procedures are promulgated, universities should be held to those procedures under state or federal constitutional law, contract law, or the law of private associations. See text accompanying notes 46-56 & 69-95 *infra*.

19. *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 97 (1978) (White, J., concurring in part and concurring in the judgment).

the students in *Goss* [v. *Lopez*²⁰] were suspended because of their conduct.²¹

Thus, even accepting the majority's premise that hearings are inappropriate for reaching evaluative or subjective decisions, the right to a dismissal hearing should not turn upon whether the hearing is termed "academic" or "disciplinary," but rather upon whether the proposed dismissal is, at least in part, for conduct-related reasons presenting a factual dispute susceptible of resolution by a third party.²² It remains to be seen whether the lower federal courts will consider a school's characterization of a dismissal as "academic" to be conclusive in all cases.²³

Although Justice Rehnquist attempted in *Horowitz* to distinguish *Goss* v. *Lopez*²⁴ as a case in which "the school's decision to suspend the students rested on factual conclusions . . .,"²⁵ the Court in *Goss* recognized the right of a student "to characterize his conduct and put it in what he deems the proper context."²⁶ Even in the absence of a factual

20. 419 U.S. 565 (1975).

21. 435 U.S. at 104 (footnotes omitted). Justice Marshall also pointed out that "[t]he [state and lower federal court] decisions on which the Court relies . . . plainly use the term 'academic' in a much narrower sense than does the Court, distinguishing 'academic' dismissals from ones based on 'misconduct' and holding that, when a student is dismissed for failing grades, a hearing would serve no purpose." 435 U.S. at 105 (footnote omitted). Officials of the University of Missouri had themselves framed the issue of Charlotte Horowitz' failings as "*not one of academic achievement*, but of performance, relationship to people and ability to communicate. . . ." (emphasis added). 435 U.S. at 103.

22. The reliance upon labels such as "academic" or "disciplinary" to determine the applicability of procedural protections permits "defensive bureaucratic behavior" (with a consequent denial of student rights) such as has been predicted in the case of disciplinary suspensions from secondary schools: "[Nullification of the right to due process hearings] could be accomplished by altering the *substantive* bases for suspension; for example, identifying 'insubordination' and not some more objective and specifiable mischief as justifiable basis for discipline would effectively disable a student from disputing the matter." Kirp, *supra* note 17, at 862.

23. The line between academic and disciplinary dismissals may be assuming less practical significance, however, since proof of actual injury is now a prerequisite to recovery of more than nominal damages in actions against school authorities for denial of disciplinary dismissal hearings. *Carey v. Piphus*, 435 U.S. 247 (1978), and because the *Horowitz* majority has minimized the scope of the hearings mandated by *Goss* v. *Lopez*, 419 U.S. 565 (1975): "All that *Goss* required was an 'informal give-and-take' between the student and the administrative body dismissing him . . ." 435 U.S. at 86. Indeed, one might ask whether it is significant for the future of the *Goss* disciplinary hearing requirement that Justice Stevens, the fifth member of the *Horowitz* majority, has taken Justice Douglas' seat on the Court, Douglas having been the fifth member of the *Goss* majority. The scope of the *Goss* opinion has also been limited by subsequent Supreme Court decisions rejecting claims of allegedly unconstitutional governmental stigmatization. *E.g.*, *Codd v. Velger*, 429 U.S. 624 (1977); *Bishop v. Wood*, 426 U.S. 341 (1976); *Paul v. Davis*, 424 U.S. 693 (1976).

24. 419 U.S. 565 (1975).

25. 435 U.S. at 89.

26. 419 U.S. at 584. "This opportunity [to be heard] is no less important when, as here, there is not a serious dispute over the factual basis for the charge, for . . . things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context." *Strickland v. Inlow*, 519 F.2d 744, 746 (8th Cir. 1975) (quoting *Goss* v. *Lopez*, 423 U.S. 565 (1975)).

Professor Tribe has argued that the right to be heard is "ultimately more understandable as inherent in decent treatment than as optimally designed to minimize mistakes." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-15, at 554 (1978). *Cf.* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring):

The validity and moral authority of a conclusion largely depend upon the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

dispute, the opportunity to characterize his or her conduct prior to academic dismissal would allow a student to bring mitigating circumstances, such as illness or family problems, to the attention of school authorities. An academic dismissal hearing would also provide the student with a chance to discuss sanctions short of dismissal (for instance, academic probation or remedial work) or the terms of the dismissal (such as the possibility of later readmittance or of retaking failed examinations or courses).²⁷

The second basis for the majority's conclusion that due process protections are inapplicable to academic dismissals is that public school authorities possess expertise in academic matters and therefore should not be interfered with by the courts.²⁸ An observation of Judge David Bazelon about judicial competence in the area of mental health may be paraphrased as a rebuttal to *Horowitz*'s deference to academic expertise:

[D]iffidence in the face of [academic] expertise is conduct unbecoming a court. Very few judges are [educational experts]. But equally few are economists, aeronautical engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject similar scrutiny of [academic matters]

It is often unclear precisely what scope of review is appropriate, or what result such review demands. But the principle of a division of responsibility between administrators skilled in their area and judges skilled in the law is clear and has proved workable.²⁹

This division of responsibility and of expertise is indeed the key to judicial

Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

27. Several United States courts of appeals have recognized the value of due process hearings in allowing a student threatened with disciplinary dismissal to argue for mitigation of punishment. *Hatch v. Goerke*, 502 F.2d 1189, 1195 (10th Cir. 1974); *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972); *Betts v. Board of Educ.*, 466 F.2d 629, 633 (7th Cir. 1972) (dictum). See also *Dessem, supra* note 4, at 297-98; *Codd v. Velger*, 429 U.S. 624, 634 (1977) (Stevens, J., dissenting) ("In short, the purpose of . . . [an employment dismissal] hearing, as is true of any other hearing which must precede a deprivation of liberty, is two-fold: first to establish the truth or falsity of the charge, and second, to provide a basis for deciding what action is warranted by the facts.").

28. In another opinion for the Court in the 1977-78 term, Justice Rehnquist has generally criticized judicial policy-making or "judicial intervention [into areas of administrative expertise] run riot." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557 (1978), and Justice Powell (a former school board member) has consistently argued that the nation's schools must be run by local educators without interference from the courts. See *Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 SUP. CT. REV. 25, 45 (1975) ("Mr. Justice Powell's posture in *Goss* and in *Wood v. Strickland* reflects what is becoming a most prominent theme of his tenure: the determination to contain constitutional interference with the operations of the public schools.").

29. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743-44 (1969). See also the entry of one of Judge Bazelon's colleagues, Judge Wright, into another area of academic expertise in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967) and the criticisms of that decision, Note, *Hobson v. Hansen: Judicial Supervision of the Color-Blind School Board*, 81 HARV. L. REV. 1511 (1968); Recent Developments, *Hobson v. Hansen: The De Facto Limits on Judicial Power*, 20 STAN. L. REV. 1249 (1968).

review of academic or other nonjudicial decision-making. The recognition of a right to academic dismissal hearings in *Horowitz* would not have taken courts beyond their own area of expertise in the enunciation and protection of procedural rights; the effect instead would merely have been to require schools to actually exercise their acknowledged academic expertise by holding such academic dismissal hearings.

A majority of the Supreme Court has now rejected this argument, however, even though the potential number of academic dismissal hearings involved would probably have been less than the number of disciplinary hearings now required by *Goss v. Lopez*.³⁰ Furthermore, such hearings would not have challenged the authority, character-shaping goals, or need for order of a college or university as court-mandated disciplinary hearings may in public secondary schools.³¹ Since an affirmance of the Eighth Circuit Court of Appeals in *Horowitz* would most likely not have resulted in the number of "judicial interventions" into the schools as are currently mandated by *Goss*, and since the *Horowitz* majority itself recognized that any such "interventions" would be to protect a significantly more important student interest than is protected by secondary school disciplinary hearings,³² the qualitative differences in such hearings—and in the processes of secondary and higher education in this country—must explain the Supreme Court's refusal to extend the rationale of *Goss* to academic failure in higher education.³³

While dismissal from a college or university is more serious to the student involved than a short suspension from secondary school, the

30. See Dessem, *supra* note 4, at 300 n.136. "Currently, approximately 10 percent of all junior and senior high school students are so disciplined [by suspensions of the type discussed in *Goss*] at least once during the school year." Kirp, *supra* note 17, at 850.

Compare these findings with the statistics on the percent of students completing their freshman year of college in good academic standing contained in COLLEGE ENTRANCE EXAMINATION BOARD, THE COLLEGE HANDBOOK (16th ed. 1977) (e.g., Bryn Mawr College, 99%; University of Michigan, 97%; University of Dayton, 90%; University of Arizona, 80%). "[T]he rate of attrition in U.S. medical schools is [even] low[er] than that of undergraduate institutions]—less than 5 percent." ASSOCIATION OF AMERICAN MEDICAL COLLEGES, MEDICAL SCHOOL ADMISSION REQUIREMENTS 1978-79 44 (28th ed. 1977). The number of actual separations for academic reasons is "uncommonly small" at many medical schools; in recent academic years at the Case Western Reserve University School of Medicine there have sometimes been no academic separations and never more than two such dismissals (out of a total school enrollment in excess of 500 students). Conversation of June 8, 1978 with Dean Daniel L. Horrigan of the Case Western Reserve University School of Medicine.

31. See Kirp, *supra* note 17, at 853-59. It also seems likely that while the residents and taxpayers of some communities may consider the requirements of *Goss* to be a threat to their local control of public elementary and secondary schools, the average state citizen—not being as directly involved in the governance of state colleges and universities as in the control of local elementary and secondary schools—would not have considered the requirement of academic dismissal hearings an unjustifiable judicial intrusion into public higher education.

32. 435 U.S. at 86 n.3. Cf. Dessem, *supra* note 3, at 287 n.74. Although the weight of the private interest at stake is not relevant to the existence of a constitutionally protected liberty or property interest, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972), "a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process." *Id.* at 570. See also Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

33. Another possible explanation is that a majority of the present Justices are unconvinced of the correctness of the *Goss* decision itself. See note 23 *supra*.

interests of the college or university—and of society at large—in producing capable graduates and professionals is much more important also. The requirement of due process is not without its potential costs: “the discretion that due process checks may well be the handmaiden of arbitrariness; it may equally well be prerequisite to the maintenance of institutional excellence.”³⁴ The Supreme Court in *Horowitz* has concluded that the constitutional recognition of academic due process rights for students is incompatible with the discretion necessary for institutional excellence and has, therefore, struck the balance in favor of academic discretion over procedural safeguards.³⁵

B. Judicial Protection from Substantive Due Process Violations

Not only did the *Horowitz* Court conclude that procedural due process protections are inapplicable when a school dismissal is based upon academic deficiencies, but Justice Rehnquist’s majority opinion closes with an admonition against “judicial intrusion into academic decision-making” to review substantive due process challenges to university dismissals.³⁶ The Court’s own dictum on this point brushes aside as “dictum of a number of lower courts”³⁷ an established line of cases—both federal and state—recognizing the right to judicial review of allegedly “arbitrary, capricious, or bad faith” academic dismissals from public higher education³⁸ and was offered despite the fact that the court of appeals had not had a chance to consider the question in the first instance.³⁹

If a school’s characterization of a dismissal as “academic” is deemed sufficient to immunize even substantive due process violations from judicial scrutiny, problems will be created for both students and the lower

34. Kirp, *supra* note 17, at 874.

35. The *Horowitz* majority also suggested that even allegedly “arbitrary, capricious or bad faith” dismissals are not to be subject to stringent judicial review. 435 U.S. at 92. See text accompanying notes 36-45 *infra*.

36. 435 U.S. at 92.

The substantive due process claims of *Horowitz* include[d] the failure of the Medical School to follow its own rules and regulations in dismissing her, the decision to exclude *Horowitz* from the option of extending her education at the School even though that option was offered to other students, the alteration by the School of the standards by which *Horowitz* was evaluated and the *ex post facto* application of new standards to the performance of *Horowitz*, the discriminatory evaluation of *Horowitz* based upon her sex and physical appearance, and the arbitrary nature of the assessment of her clinical competence.

Brief for Respondent at 42, Board of Curators of the Univ. of Mo. v. *Horowitz*, 435 U.S. 78 (1978). Her counsel argued that even if the Supreme Court did not recognize a right to academic dismissal hearings in all cases, Charlotte *Horowitz*’ dismissal had been so arbitrarily conducted that she was entitled to such a hearing.

37. 435 U.S. at 91.

38. See the cases collected and discussed in Dessem, *supra* note 4. Even though the federal district judge who tried her case ruled that Charlotte *Horowitz* had no right to an academic dismissal hearing, he explicitly recognized that “[i]f the student was actually expelled for reasons other than the quality of his work or if the student failed because of bad faith or arbitrary or capricious action by an instructor, the courts will order the granting of a fair and impartial hearing.” *Horowitz v. Curators of the Univ. of Mo.*, No. 74CV47-W-3 at 19-20 (W.D. Mo. Nov. 14, 1975).

39. 538 F.2d at 1321 n.5.

federal courts. The distinction of academic from nonacademic bases for dismissal is often difficult, especially in professional schools where part of the educational experience consists of clinical training and socialization in the norms of the profession. May a medical student now be dismissed without a hearing for criticizing policies of the American Medical Association (thereby creating friction with medical colleagues and interfering with the student's ability to become "a good medical doctor")? Can personal hygiene be considered an academic factor in the dismissal of law students or Ph.D. candidates as it apparently can be by medical schools?⁴⁰ Although clearly conduct-related and seemingly "arbitrary, capricious or in bad faith" on their face, such factors could also be considered "academic" in the broadest sense of the word.⁴¹

The lower federal and state courts should reject such characterizations and continue to review dismissals in which officials of the defendant university have acted "arbitrarily, capriciously or in bad faith." Since such action, if established, is, in effect, action based on other than academic considerations,⁴² the *Horowitz* majority's deference to academic expertise should not bar judicial scrutiny. Proof that a student has been dismissed for nonacademic reasons should, therefore, still entitle that student to a fair hearing conducted within the university;⁴³ once the university employs bona fide academic criteria to determine whether to dismiss a student, the judicial inquiry is at an end.⁴⁴ The state and lower federal courts should preserve this limited judicial protection—that "academic" dismissals are actually for academic reasons—and should not consider Justice Rehnquist's passing dictum in *Horowitz* to be a rejection of the established judicial oversight of substantive due process violations in the nation's public colleges and universities.⁴⁵

40. 435 U.S. at 91 n.6.

41. Cf. *Pickering v. Board of Educ.*, 391 U.S. 563, 567 (1968) (public high school teacher dismissed when publication in local paper of his letter criticizing school administration found "detrimental to the best interests of the schools"); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 152 n.2, cert. denied, 368 U.S. 930 (1961) (students dismissed "[f]or Conduct Prejudicial to the School and for Conduct Unbecoming a Student").

42. Note, *Due Process and the University Student*, *supra* note 4, at 947.

43. The traditional remedy for an arbitrary, capricious or bad faith academic dismissal is a fair hearing conducted by the university rather than judicial reinstatement of the dismissed student. See *Connelly v. University of Vt. and State Agric. College*, 244 F. Supp. 156, 161 (D. Vt. 1965) ("should the plaintiff prevail on the issue of whether the defendant acted arbitrarily, capriciously or in bad faith, this Court will then order the defendant University to give the plaintiff a fair and impartial hearing on his dismissal order."). See also *Dessem*, *supra* note 4.

44. Consider, however, the suggestion that "there may be rare occasions when . . . administrative hostility to students' procedural due process rights could . . . lead courts to reinstate students directly rather than go through the further delay of a second school hearing." *Dessem*, *supra* note 4, at 289 n.82.

45. Justice Rehnquist's opinion in *Horowitz* cites, without specifically criticizing, the case of *Greenhill v. Bailey*, 519 F.2d 5, 7 (8th Cir. 1975), relied upon by the Eighth Circuit Court of Appeals in *Horowitz*. In *Greenhill* the administration of the University of Iowa notified the Association of American Medical Colleges of the student's dismissal, noting that the apparent reason for his failure was "lack of intellectual ability or insufficient preparation." The Eighth Circuit found that the defendant university had unconstitutionally breached a fourteenth amendment liberty interest of the

C. A University's Failure to Follow Its Own Rules

The final significant dictum in the majority opinion, and the dictum of perhaps greatest significance outside the area of educational law, is Justice Rehnquist's statement in the last footnote of his opinion that a state university's failure to follow its own rules in dismissing a student for academic reasons does not violate the United States Constitution.⁴⁶ In the cases of *United States ex rel. Accardi v. Shaughnessy*⁴⁷ and *Service v. Dulles*⁴⁸ the Supreme Court had established more than two decades ago the principle that federal administrative agencies are bound by their own rules and regulations. In its final dictum the *Horowitz* Court distinguished these cases as "enunciat[ing] principles of federal administrative law rather than of constitutional law binding upon the States."⁴⁹

Although the requirement that public bodies follow their own rules is most frequently discussed in relation to federal administrative agencies,⁵⁰ some courts have recognized a more general rule of law that "an organization may create procedural rights in addition to the constitutional minimum where its own rules prescribe the additional safeguards."⁵¹ University dismissal procedures can thus be considered such "rules or understandings that . . . secure certain benefits" and "upon which people rely in their daily lives."⁵²

plaintiff, since "[t]he information communicated outside the medical school goes beyond a factual statement that Greenhill had failed his junior year, or a mere recitation of academic grades, and suggests that Greenhill is intellectually unfit to undertake the study of medicine at all." *Id.* at 8. The court therefore concluded that the student was entitled to notice and hearing prior to such stigmatization.

Since the Supreme Court assumed a liberty interest at stake in *Horowitz* (and nevertheless found that procedural due process protections were unnecessary), it is an open question whether even the very limited protections of *Greenhill* survive the broadly written *Horowitz* opinion. *Greenhill* should survive, however, since the Court's emphasis in *Horowitz* was upon a university's academic expertise in student dismissals, whereas such academic expertise is not implicated in the release of derogatory characterizations of the dismissed student (as opposed to statements that a student has been dismissed for failure to meet the academic standards of the school). Indeed, none of the Eighth Circuit judges voting to grant the University of Missouri's petition for rehearing *en banc* in *Horowitz* criticized the *Greenhill* decision; instead they found *Horowitz* factually distinguishable because there had been no public disparagement of Charlotte Horowitz' intellectual capacity. 542 F.2d at 1335.

Even the survival of such an exception to the noninterventionist policy of *Horowitz* will most likely be of quite limited value, however, for the most serious injury to dismissed students in terms of foreclosed educational and career opportunities is likely to stem from the fact of the dismissal itself rather than from any characterization of its basis. See Dessem, *supra* note 4, at 287 n.74. In today's competitive educational and job markets, second chances for failed students are the exception rather than the rule.

46. 435 U.S. at 92 n.8.

47. 347 U.S. 260 (1954).

48. 354 U.S. 363 (1957).

49. 435 U.S. at 92 n.8.

50. See, e.g., Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

51. *Warren v. National Ass'n of Secondary School Principals*, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974). *Contra* *Ryan v. Aurora City Bd. of Educ.*, 540 F.2d 222, 228-29 (6th Cir. 1976), cert. denied, 429 U.S. 1041 (1977); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972). See also *Behagen v. Intercollegiate Conference of Faculty Reps.*, 346 F. Supp. 602, 606 (D. Minn. 1972).

52. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Even if school dismissal procedures are not found to create protected procedural rights as a matter of constitutional law, a college or university, once it has adopted such rules, should be held to them. The Court in *Horowitz* assumed that the decision to dismiss Charlotte Horowitz implicated a constitutional liberty or property interest,⁵³ but nevertheless concluded that because of "the evaluative nature of the inquiry and the historically supported interest of the school in preserving its present framework for academic evaluations"⁵⁴ the requirement of a dismissal hearing would represent "judicial intrusion into academic decisionmaking."⁵⁵ *Horowitz* can therefore be seen as creating a defense or excuse for the refusal of public universities to hold hearings that would otherwise be constitutionally mandated. When, however, the "historic judgment"⁵⁶ of educators at a particular university has been to require academic dismissal hearings, "judicial intrusion" would be at a minimum and the defense of academic expertise should be considered waived.

Even if one agrees with Justice Rehnquist that judges are not competent to impose academic dismissal procedures upon public higher education and that questions of academic dismissal do not lend themselves to resolution by traditional constitutional due process procedures, a university's promulgation of predissmissal procedures represents a statement by academic experts of those procedures considered best suited to academic dismissals at that particular school. The Supreme Court's analysis of a university's failure to follow its own procedural predissmissal rules is, therefore, incomplete. It fails to recognize that such rules—determined by the very academic experts to whom the *Horowitz* majority otherwise pays such deference—are the best available evidence of a fair academic dismissal policy.

II. THE RIGHT TO AN ACADEMIC DISMISSAL HEARING UNDER STATE LAW

Although the Supreme Court has refused to require academic dismissal hearings under the fourteenth amendment to the United States Constitution, such hearings may nevertheless still be required under state law. Three possible state law theories that may still be used to establish a legal right to academic dismissal hearings will now be explored.⁵⁷

53. 435 U.S. at 84-85. In many states an equally strong argument can be made for the recognition of a constitutionally protected property interest in higher education. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

54. 435 U.S. at 86 n.3.

55. *Id.* at 92.

56. *Id.* at 90.

57. A right to academic dismissal hearings may also be secured by other methods. External regulation by the federal or state governments or by private accrediting associations has been suggested

A. State Constitutional Law

An area of increasing interest and significance for both legal commentators and practitioners is the use of state law, particularly state constitutional law, for the vindication of human rights and as an alternative to the protection afforded such civil liberties by the United States Constitution.⁵⁸ Thus, in the wake of recent decisions of the United States Supreme Court, state supreme courts have ruled that, although the United States Constitution may not protect a particular interest, the same right is nevertheless secured under the applicable state constitution.⁵⁹ Now that the Supreme Court has ruled that academic dismissal hearings are not mandated by the fourteenth amendment, state constitutional law may well be invoked by students desirous of predissmissal hearings.

Students attempting to establish a right to academic dismissal hearings under state constitutional law can rely upon either the due process clauses contained in state constitutions⁶⁰ or the detailed educational provisions also frequently found in state constitutions.⁶¹ To achieve procedural protections under the due process clauses of state constitutions, students must first establish either protected liberty or property interests; since, however, the courts have uniformly found constitutional liberty or property interests implicated in school disciplinary dismissals,⁶²

as a possibility for effectuating student protections. Comment, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L. J. 608, 632-33 (1976). Other commentators have considered the application of the law of trusts or fiduciaries to the student-university relationship. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L. J. 643 (1966); Project, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795, 806, while at least one author has found all existing theories of law inadequate to govern this relationship and has therefore proposed a "unitary theory" of student-school relations. Note, *The Student-School Legal Relationship: Toward a Unitary Theory*, 5 SUFFOLK U. L. REV. 468 (1971).

Efforts to obtain voluntary adoption of some form of academic dismissal hearings should prove successful at many schools. See *Joint Statement on Rights and Freedoms of Students*, 54 A.A.U.P. BULL. 258, 259 (1968): "Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled."

58. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976).

59. See the cases collected in the articles cited in note 58 *supra*.

60. See, e.g., article I, section 2 of the Declaration of Rights of the Louisiana Constitution of 1974; article I, section 11 of the Virginia Constitution of 1971; article I, section 16 of the Ohio Constitution of 1851.

61. See, e.g., article VIII of the Virginia Constitution of 1971; Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. RICH. L. REV. 263 (1971).

62. See *Goss v. Lopez*, 419 U.S. 565 (1975) and the cases cited therein; *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971). Note also state court decisions finding the right to elementary and secondary education so important that its financing through local property taxes is violative of state constitutions. *Serrano v. Priest*, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), cert. denied, 432 U.S. 907 (1977); *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973). *Contra*, *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973).

the establishment of state rights or entitlements to higher education should not prove an insurmountable task.⁶³

The recognition of a right or entitlement to higher education—under the education or due process clauses of a state constitution or under state statutory law—will not necessarily guarantee students the right to academic dismissal hearings.

A state supreme court may recognize such a right yet nevertheless decide to follow the lead of *Horowitz* and conclude that state procedural protections otherwise applicable are inappropriate due to the academic nature of the underlying dispute.⁶⁴ This result would not be compelled, however; since the balancing of governmental and private interests at stake in an academic dismissal is, under *Mathews v. Eldridge*,⁶⁵ an evaluative and subjective decision, state supreme courts may well reach different conclusions about the necessity of predissmissal hearings under state constitutional or statutory law.

Such a different outcome at the state level might be based on a determination that there is a fundamental right to higher education under state law. State courts may also conclude that, since a state's public universities have traditionally been closely regulated by the state government, the requirement of academic dismissal hearings would not constitute unjustified judicial interference with school autonomy. The consideration and weighing of such factors can best be done by state courts familiar with the constitution, laws, and political structure of a particular state. To the extent that Justice Rehnquist's opinion in *Horowitz* is seen to be premised upon concerns of federalism and the avoidance of due process mandates of nationwide applicability,⁶⁶ the decision becomes less a restriction upon state courts interpreting their own state laws.⁶⁷ Now that the Supreme

63. The establishment of such liberty or property interests will not only create state law protections for contemporary students, but can also provide a solid basis for fourteenth amendment hearings if a future Supreme Court balances the societal and personal interests at stake in academic dismissals differently than did the Court in *Horowitz*. Cf. Brennan, *supra* note 58, at 503 (footnote omitted):

If the Supreme Court insists on limiting the content of due process to the rights created by state law, state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect.

64. Many of the cases cited by the *Horowitz* majority are, in fact, decisions of state courts.

65. 424 U.S. 319 (1976). See note 14 *supra*.

66. See the quotation from *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) in *Horowitz* that "[b]y and large, public education in our Nation is committed to the control of state and local authorities." 435 U.S. at 91. Justice Rehnquist's concern with federalism has been analyzed in Shapiro, *supra* note 9, at 315-22.

67. Consider the following analysis of the California Supreme Court in *Serrano v. Priest*, 18 Cal. 3d 728, 766-67, 557 P.2d 929, 951-52, 135 Cal. Rptr. 367-68 (1976), *cert. denied*, 432 U.S. 907 (1977) (footnotes & citations omitted):

We are fortified in reaching this conclusion [that the Supreme Court's decision on public school financing under the United States Constitution in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), does not foreclose a different result under the California Constitution] by language appearing in the *Rodriguez* decision itself. The high court, in passing upon the validity of the Texas system under the federal equal protection

Court has refused to require predissmissal hearings as a matter of federal due process, state constitutional law provides one of the more promising avenues for students seeking procedural protections in academic dismissals.⁶⁸

B. *Reliance Upon State Contract Law*

Despite the dictum of the *Horowitz* majority that public universities are not constitutionally bound to follow their own rules and regulations,⁶⁹ a strong argument can still be made that an academic dismissal in contravention of a school's published policies and procedures constitutes a breach of contract. "Until the early 1900's, the relationship between the student and the institution was expressly stated in a written enrollment contract, which was essentially a business agreement between the parent of the student and the institution."⁷⁰ Such express or implied contracts were commonly found by the courts to justify summary dismissals of students for alleged academic or disciplinary failings.⁷¹ However, if students are able to successfully enforce such contracts against colleges and universities, they may be able to gain protections that are now unavailable to them under the fourteenth amendment.

Under the contract theory of student-university relations, the contract between the parties is drawn from written documents of the university (particularly school catalogues and bulletins), as well as from unwritten policies and understandings that are considered implied terms of the contract.⁷² Applying such contract law to an area of great academic

clause, repeatedly emphasized its lack of "expertise" and familiarity with local problems of school financing and educational policy, which lack "counsel[s] against premature interference with informed judgments made at the state and local levels." These considerations, in conjunction with abiding concerns from the standpoint of federalism, in the high court's view "buttress[ed] [its] conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny." This court, on the other hand, in addressing the instant case occupies a position quite different from that of the high court in *Rodriguez*. The constraints of federalism, so necessary to the proper functioning of our unique system of national government, are not applicable to this court in its determination of whether our own state's public school financing system runs afoul of state constitutional provisions.

See also *Robinson v. Cahill*, 62 N.J. 473, 490-91, 303 A.2d 273, 282, cert. denied, 414 U.S. 976 (1973).

68. Even if state courts conclude that hearings are inappropriate when dismissal is for academic reasons, they may nevertheless agree with Justice Marshall's dissent in *Horowitz* that for the purposes of judicial review, "academic" dismissals should not include cases in which a student's conduct is at issue. 435 U.S. at 103-06. See text accompanying notes 22-23 *supra*.

69. 435 U.S. at 92 n.8. See text accompanying notes 46-56 *supra*.

70. Note, *Contract Law and the Student-University Relationship*, 48 IND. L. J. 253, 253 (1973). See also *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (reference made to "the well-settled rule that the relations between a student and a private university are a matter of contract"). The relation between a student and a public university can also be considered contractual in nature. Note, *supra* note 57, at 474.

71. See cases collected in Note, *Due Process in Academic Dismissals*, *supra* note 4, at 115; Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95, 104-06 (1973) [hereinafter cited as Note, *Judicial Review*]; Note, *supra* note 57, at 475.

72. Note, *supra* note 70, at 255-59; Note, *supra* note 57, at 475-79. An important implied term in such student-university contracts may be that the university will not dismiss or deny the student a degree for irrational or bad faith academic reasons (a standard similar to the substantive due process limitation on dismissals from public universities, see text accompanying notes 36-45 *supra*). *Giles v.*

concern and expertise—the admission of a student to medical school—the Illinois Supreme Court has recently ruled that the allegation of an unsuccessful applicant that a medical school evaluated his application upon nonacademic factors rather than upon the basis of academic criteria set forth in the school's bulletin stated a valid cause of action.⁷³ Similar reasoning could lead courts in appropriate cases to find contracts, either in school documents or implied therefrom, restricting dismissals to delineated academic or reasonable nonacademic reasons.

Some courts, however, still refuse to strictly enforce student-university contracts against universities, especially when the dispute concerns academic grading or dismissal procedures. The First Circuit Court of Appeals, for example, has reasoned that

it is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem. . . . This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. . . . The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category.⁷⁴

The court of appeals therefore refused to construe against the defendant university an ambiguity in a document establishing a grade appeal procedure for students, even though the university itself had drafted that document. This judicial abstention stands in sharp contrast to the position taken by the federal district judge in this same case: "[T]he Court cannot refuse to decide whether an enforceable promise has been broken, simply because the contract is drawn between school and student, particularly when both parties agree that they stand in a contractual relationship."⁷⁵

Even when both parties to a student-school dismissal dispute do not agree that an enforceable contract exists between them,⁷⁶ courts can

Howard Univ., 428 F. Supp. 603, 606 (D.D.C. 1977); *Balogun v. Cornell Univ.*, 70 Misc.2d 474, 477, 333 N.Y.S.2d 838, 841-42 (Sup. Ct. 1971) ("[T]here is no showing that denial of plaintiff's degree was arbitrary, malicious, capricious, or in any way discriminatory. . . . Abuse of discretion or gross error has not been shown.")

73. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634 (1977). See also Comment, *supra* note 57; Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755 (1976).

74. *Lyons v. Salve Regina College*, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978) (quoting *Slaughter v. Brigham Young Univ.* 514 F.2d 622, 62 (10th Cir. 1975)). A similar conclusion was reached in *Sofair v. State Univ. of N.Y. Upstate Medical Center College of Medicine*, 54 App. Div. 2d 287, 292, 388 N.Y.S.2d 453, 456 (1976), *appeal denied*, 41 N.Y.2d 803, 393 N.Y.S.2d 1027 (1977): "[L]iteral adherence to internal rules will not be required when the dismissal rests upon expert judgments as to academic or professional standards and such judgments are fairly and nonarbitrarily arrived at."

75. *Lyons v. Salve Regina College*, 422 F. Supp. 1354, 1359 (D.R.I. 1976), *rev'd*, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978).

76. Disagreement between the student and university over the existence of a contract is a major impediment to the application of contract law to the student-university relationship. "Contract law, developed 'primarily to resolve conflicting individual interests,' cannot satisfactorily accommodate 'the competing interests of groups, individuals, and society.' Moreover, the faculty, students, and

appropriately employ contract law doctrines to protect the justifiable expectations of both the student and university involved. For enforcement of student-university contracts to protect students, however, courts must consider the substance rather than the form of such contracts and recognize the usual imbalance in bargaining power between student and university. The courts should also recognize that almost all written portions of the parties' contract will have been drafted by the university.⁷⁷ The enforcement of such contracts would merely hold universities to an even-handed application of those procedures that they, the academic experts, have found to be fair and necessary when a student is threatened with academic dismissal. Such contractual enforcement could provide valuable protection for students threatened with academic dismissal, now that the Supreme Court, in *Horowitz*, has refused to extend to them the protections of the fourteenth amendment.

C. *The Law of Private Associations*

As with contract law, and in contrast to state constitutional and statutory law, the law of private associations may provide students at *private* colleges and universities with a basis upon which to obtain notice and hearing prior to academic dismissal. Although traditionally applied to such private associations as churches, labor unions, social clubs, and professional associations, several legal commentators⁷⁸ have argued that the law of private associations, which is "concerned with the problem of protecting individuals from arbitrary and abusive exercise of power by organized groups of which they are members,"⁷⁹ should also be applied to the relationship between students and private universities. Indeed, the Fifth Circuit Court of Appeals in *Dixon v. Alabama State Board of*

administrators at a university certainly do not view their activities in contractual terms." Note, *Judicial Review*, *supra* note 71, at 105 (footnotes omitted).

77. Schools should not be able to avoid contractual responsibilities simply by stating, "The Bulletin is not to be regarded as a contract." Comment, *supra* note 57, at 631 n.105. See also the college regulation considered dispositive in *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 489, 231 N.Y.S. 435, 438 (1928) ("the University reserves the right and the student concedes to the University the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given."). Professor Seavey called this "a strange document for a respectable college to prepare and for a court to uphold." Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1409 (1957).

Several commentators have suggested that the disparity in bargaining power between student and university is so extreme that the contract doctrine of unconscionability or adhesion should be applied to student-school contracts in some instances. Comment, *supra* note 57, at 616-18; Note, *Judicial Review*, *supra* note 71, at 104-05. Whether or not this principle is relevant to student dismissals for allegedly academic reasons, other less extreme contract doctrines (such as the resolution of ambiguity against the drafter of the contract—usually the university) could and should be employed by the courts. For it is still true that "[t]ypical student cases involving private colleges have manifested a shocking indifference to a number of considerations which have tempered the law of contracts even in more commercial fields such as insurance and sales." Van Alstyne, *The Student as University Resident*, 45 DEN. L. J. 582, 583 n.1 (1968).

78. E.g., Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974); Note, *Judicial Review*, *supra* note 71.

79. *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 989 (1963).

Education,⁸⁰ the landmark decision recognizing a constitutional right to notice and hearing prior to disciplinary dismissal from a public university, cited state cases dealing with expulsions from a medical society and a labor union for the proposition that "even private associations must provide notice and a hearing before expulsion."⁸¹

Since courts have been reluctant to apply the law of private associations to institutions of higher education,⁸² it is unrealistic to anticipate any sweeping movement by the courts to apply this legal doctrine to the specific problem of academic dismissals. Respect for institutional autonomy⁸³ and the question of judicial versus institutional (academic) expertise will discourage judicial entry into this area. Therefore, the initial reliance upon the law of private associations is most likely to occur in the judicial enforcement of a university's own rules pertaining to academic dismissals. Judicial review in such cases would merely ensure adherence to those rules that a university's own academic experts have found necessary to that university's individual institutional goals.⁸⁴ Such enforcement would reconcile judicial deference to institutional autonomy and expertise with the competing concern of the law of private associations for the prevention of arbitrary expulsion of association members.⁸⁵

It is unlikely that state courts, in applying the law of private associations to universities having no academic dismissal procedures of their own, will mandate the kind of detailed due process procedures outlined in some of the disciplinary dismissal cases.⁸⁶ In all probability, they will instead be satisfied by a much less formal hearing free of malice or bad faith.⁸⁷ Even such informal due process as this, however, may provide more meaningful protection than would the application of contract law in such situations.

80. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

81. *Id.* at 157.

82. Note, *supra* note 78, at 140-45; Note, *Judicial Review*, *supra* note 71, at 107 n.77.

83. This respect for educational and institutional autonomy is apparent in the majority opinion in *Horowitz*, 435 U.S. at 91. The tradition of independence in private higher education in the United States, *cf.* *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), may result in even greater deference to institutional autonomy when the challenged academic dismissal is from a private university.

84. See text accompanying notes 46-56 *supra*.

85. In addition to the questions of an organization's interest in its autonomy, of the practical limitations on judicial review, and of the alleged harm to the individual and to society, courts prior to judicial intervention into the otherwise private affairs of an organization have also considered whether extrajudicial methods of control are available, whether the association can be said to possess monopoly power, and whether the association is operating under a governmental grant of rights or powers. *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983, 990-94 (1963). An analysis of these latter factors also argues for application of the law of private associations to college and university dismissals. See generally Note, *supra* note 78; Note, *Judicial Review*, *supra* note 71.

86. See the discussion of due process procedures in school disciplinary hearings in D. KIRP & M. YUDOF, *EDUCATIONAL POLICY AND THE LAW* 195-97 (1974); Buss, *supra* note 62. See also the various hearing requirements considered and imposed in the multitude of school disciplinary cases cited in *Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975).

87. In his classic article on the law of private associations, Professor Chafee proposed three tests for determining the legality of an expulsion: "(1) the rules and proceedings must not be contrary to

In cases in which the courts cannot merely enforce a university's own rules, immediate acceptance of even a relaxed standard of review seems unlikely. There are, however, indications that some courts may eventually move in this direction. A recent example of judicial application of the law of private associations to an area into which the courts had previously refused to intervene is found in *Ezekial v. Winkley*.⁸⁸ In this 1977 decision the California Supreme Court held that a surgical resident at a private teaching hospital was entitled to "fair procedure" (that is, notice and hearing) prior to dismissal from the hospital's residency program. The court recognized this right, which had previously been applied to access to staff privileges at California hospitals, because the plaintiff's dismissal from the hospital's residency program would, as a practical matter, have prevented his acceptance into any other surgical residency program in the state.⁸⁹ The supreme court therefore found the plaintiff's expulsion to have the same practical effect as an expulsion from a professional society or labor union, to which the California courts had previously applied the law of private associations. The court described these groups as "private entities [that] possess substantial power either to thwart an individual's pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced."⁹⁰

The rationale of *Ezekial* can also be applied to cases in which students are threatened with expulsion from undergraduate, graduate, or professional schools. At her trial, Charlotte Horowitz offered testimony that her chances for a medical career had been destroyed by her expulsion from the University of Missouri-Kansas City Medical School,⁹¹ and it should be clear that expulsions from other programs of higher education could have a similar effect.⁹² Although the argument for medical expertise at a teaching hospital is at least as convincing as the argument for academic expertise in dismissals from universities or professional schools, and although the consequences of nondismissal to hospitals can be grave since the hospital may remain liable for any medical malpractice committed by a resident in training,⁹³ the plaintiff in *Ezekial* nonetheless prevailed. Despite the similarities to the situation presented in *Horowitz*, and over

natural justice; (2) the expulsion must have been in accordance with the rules; (3) the proceedings must have been free from malice (bad faith)." Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1014 (1930). Thus, when there are no rules governing academic dismissals, a university's actions would only be bounded by natural justice ("a sort of unwritten 'due process' clause," *id.* at 1015) and bad faith.

88. 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977).

89. The court found that the completion of an approved residency program is necessary to become a "board certified general surgeon" in California. See *id.* at 274, 572 P.2d at 37, 142 Cal. Rptr. at 423.

90. *Id.* at 272, 572 P.2d at 35, 142 Cal. Rptr. at 421.

91. Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 82 n.1 (1978).

92. See Dessem, *supra* note 4, at 287 n.74.

93. *Ezekial v. Winkley*, 20 Cal. 3d 267, 283-84, 572 P.2d 32, 42, 142 Cal. Rptr. 418, 428 (1977) (Mosk, J., dissenting).

the dissent of one of their fellow justices who warned that "competency of a medical resident can best be determined by the hospital chief of staff who supervises his training rather than by judges,"⁹⁴ a majority of the California Supreme Court held in *Ezekial* that notice and hearing must precede dismissal from a private hospital's residency program.

Although cases such as *Ezekial v. Winkley* may today represent the law of private associations at its furthest limits,⁹⁵ they indicate the direction that the law may take in the future as private associations become ever more powerful in our society. If this trend develops, courts may eventually invoke the law of private associations to protect students from arbitrary, capricious, or bad faith dismissals from private universities.

III. CONCLUSION

The Supreme Court's decision in *Board of Curators of the University of Missouri v. Horowitz*, although largely comprised of dicta, is now the law of the land. This article has attempted not only to analyze the Court's conclusions in *Horowitz*, but also to suggest possible remaining avenues that may allow students to receive some form of hearing prior to dismissal from higher education for academic reasons. Regardless of Charlotte Horowitz' failure to persuade a majority of the Supreme Court that the fourteenth amendment requires a hearing prior to at least some types of "academic" dismissals, students in some states should be able to gain such protection under state law.⁹⁶ While the importation of full-scale administrative due process hearings into academic dismissal decisions may be inappropriate or counterproductive to the goals of this nation's colleges and universities,⁹⁷ college, graduate, and professional students should at least be able to obtain an explanation why school authorities consider them ineligible for further schooling and an opportunity to state their side of the matter.

Due process by consent—that is, due process pursuant to voluntarily adopted procedures—is likely to be more meaningful to student and university alike than due process by command,⁹⁸ and now that the Supreme Court has spoken in *Horowitz*, there will be no federal constitutional command that schools afford their students academic dismissal hearings. In some states, however, courts will undoubtedly find in state constitutional, statutory, or common law the requirement for such hearings under certain circumstances. Such state court decisions can

94. *Id.* at 283, 572 P.2d at 42, 142 Cal. Rptr. at 428.

95. *See id.* at 280, 572 P.2d at 40, 142 Cal. Rptr. at 426.

96. The possibility of securing such protections by regulation of the federal government or private accrediting associations has also been suggested. *See* note 57 *supra*.

97. *See generally* Kirp, *supra* note 17.

98. *Id.*

provide a backdrop of minimal procedural protections for those instances in which a school's own academic dismissal procedures prove inadequate. The differing requirements that will result from such decisions may also provide some evidence to support or disprove the major premise of the majority opinion in *Horowitz*—that the judicial requirement of academic dismissal hearings is an unjustifiable interference with the processes and independence of American higher education.

Although such evidence might someday prove helpful in persuading a future Supreme Court to strike a different balance among the interests at stake in an academic dismissal, for the immediate future the federal constitutional issues implicated in such dismissals have been resolved. Student arguments for procedural protections in academic dismissal situations must now be addressed primarily to the state courts and to the teachers and administrators in whom the *Horowitz* majority has placed such confidence.